**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG DIVISION**

BANK OF CHARLES TOWN,

Plaintiff,

v. **Civil Action No. 3:10-CV-102**

ENCOMPASS INSURANCE, et al.

Defendants.

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

COMES NOW the Plaintiff, by and through its counsel, Laura C. Davis, Stephen G. Skinner, and the Skinner Law Firm, and as its Reply in support of its motion to remand pursuant to 28 U.S.C. § 1447(c), does state as follows:

On October 6, 2010, Encompass Insurance Company, Encompass Indemnity Company (hereinafter the "Encompass Defendants"), and Michelle Grossman removed this case to this Court on the basis of diversity jurisdiction. Soon thereafter, the Defendants moved for dismissal on the basis that the Palmers lacked an insurable interest in the subject home. (See Doc. 3, p. 4, ¶ h). The Defendants underline their assertion that the Palmers lacked an insurable interest in its Response to Plaintiff's Motion to Remand. (Doc. 21, p. 2 of 10, ¶ 2). The Defendants assert that the Palmers' alleged lack of an insurable interest in the home after the May 27, 2010 foreclosure eliminates the Plaintiff's claim. (See Doc. 8, p. 5 of 11).

Despite Defendants' representations to this Court that the Palmers lacked an insurable interest at the time of the water damage claim,[1] and thus, allegedly so did the Plaintiff, the Defendants at no time rescinded the Palmers' insurance policy. The Defendants have never

[1] As noted in Plaintiff's Motion to Remand, the **actual** date of loss is a genuine issue of material fact which has yet to be finally determined.

offered to refund the Palmers their insurance premiums either. Quite the contrary, the Defendants have sent the Palmers into collections for insurance premiums that they assert were incurred and owed by the Palmers on the subject property from June until August, 2010—**well after the May 27, 2010 foreclosure on the property.** (Find copy of Collections Notice with Policy Cancelation Date of August 30, 2010, Exhibit A). Accordingly, because the Defendants assert that the Palmers are liable for insurance premiums allegedly incurred **after** the foreclosure, it is disingenuous at best to represent to this Court that the Palmers' (and thus, the Plaintiff's) insurable interest in the property evaporated on the date of foreclosure.

In addition, contrary to Defendants' assertion that "Encompass Indemnity has made no payment for water damage to the Home" (Doc. 21, p. 2 of 10), Defendants affirmed coverage to the Palmers on November 1, 2010 and made a payment for water damage. (Find copy of Encompass check to Monte Palmer, attached as Exhibit B). Since the Defendants have conceded that the Palmers are entitled to insurance proceeds for the subject water damage (see Exhibit B), Defendants must be estopped from simultaneously denying the Plaintiff the same rights and consideration for its loss under *Fliatreau v. Allstate Insurance Company*, 178 W.Va. 268, 358 S.E.2d 829 (1987) and *FirstBank of Shinnston v. West Virginia Insurance Company,* 185 W.Va. 754, 408 S.E.2d 777 (1991).

With respect to the amount in controversy, despite the Defendants' attempt to shift this Court's focus and their burden of proof, it is the Defendants' obligation to show that this Court's jurisdictional limit has been met. *Schambach v. Federal Ins. Co.*, 2005 WL 3079108 *1 (N.D.W.Va., 2005)(the "burden of establishing that the plaintiffs' damages exceed the jurisdictional amount of $75,000.00 lies with the defendant.") "[I]f federal jurisdiction is doubtful, the case must be remanded." *Knott v. HSBC Card Services, Inc.*, 2010 WL 3522105 *4

(N.D.W.Va. 2010)(*citing Mulcahey v. Columbia Organic Chems. Co.,* 29 F.3d 148, 151 (4th Cir. 1994)).

In *Schambach*, Judge Stamp was asked to remand a case wherein the plaintiffs demanded $500,000 to resolve their underlying claims. 2005 WL 3079108 *2. The defendant noted that plaintiffs sought both compensatory and punitive damages, and that the plaintiffs' failure to stipulate that the amount in controversy was less than $75,000.00 was evidence that the limit was exceeded. *Id.* Judge Stamp rejected the defendant's argument and found that, despite the plaintiffs' $500,000 demand and their refusal to stipulate, the defendant failed to demonstrate that the amount in controversy had been met. *Id.*

The Court explained that a "defendant's removal cannot be based on speculation; rather, it must be based on facts as they existed at the time of removal. *Id.* (citing *Varela v. Wal-Mart Stores, East, Inc.,* 86 F.Supp.2d 1109, 1112 (D.N.M.2000)). The Court noted that the "mere "threat" of punitive damages, without more, does not give rise to federal jurisdiction." *Id.* (citing *Landmark Corp. v. Apogee Coal Co.,* 945 F.Supp. at 932, 938 (S.D.W.Va.1996)).

In addition, Judge Stamp noted that the *Schambach* plaintiffs' refusal to stipulate to limit damages of less than $75,000.00 did little to support the defendant's position that the amount in controversy exceeded $75,000.00. *Id.* The Court explained:

> While a plaintiffs' willingness to sign a binding, pre-removal stipulation limiting damages may be probative in showing a claim does not amount to the jurisdictional minimum, the refusal to sign such an agreement does not establish the requisite amount in controversy. *Gramc v. Millar Elevator Co./Schindler,* 3 F.Supp.2d 1082, 1084 (E.D.Mo.1998). Under the defendant's theory, the plaintiffs could be forced into the unfair choice of either signing a binding, post-removal stipulation created by the defendant or giving up their right to try their action in state court. This could impermissibly favor the defendant's interest in litigating in federal court above the plaintiffs' interest in remaining in the forum of their choice. Accordingly, this Court declines to adopt the defendant's rationale concerning the plaintiffs' refusal to sign a binding stipulation limiting damages, and finds that such evidence is not conclusive in determining whether the amount

> in controversy has been shown to exceed the jurisdictional minimum by a preponderance of the evidence.

Id. This Court has also found such post-removal stipulations similarly unavailing. *Knott*, 2010 WL 3522105 *3, n. 1.

In the instant case, Defendants cannot meet their burden to show that it is more likely than not that the Plaintiffs' claim gives rise to federal jurisdiction. Defendants first asserted that the amount of Plaintiffs' liquidated damages was $11,000. (Doc. 3, p. 4 of 7, ¶ h). Now, Defendants argue that the actual damages are $25,078.79. (Doc. 21, p. 7 of 10). Defendants assert that "[i]f punitive damages of just three (3) times Count I compensatory damages, or $ 75,236.37 were awarded, Bank would recover $100, 315.16[.]" *Id.* However, Defendants fail to establish that it is **more likely than not** that the Plaintiffs will be awarded **any** punitive damages, much less three (3) times what Defendants assert are Plaintiffs' compensatory damages. "[T]he mere 'threat' of punitive damages, without more, does not give rise to federal jurisdiction." *Seifert v. Nationwide Mutual Ins. Co.,* 2007 WL 1381521 (N.D.W.Va. 2007)(citation omitted).

In *Hall v. Cliffs North American Coal,* LLC, 2009 WL 4666484 *3 (S.D.W.Va. 2009), the district court found that the plaintiff's punitive damage claim alone failed to support a finding of federal jurisdiction. *Id.* The Court explained:

> Defendants provide a ratio of 5 to 1 to be applied as the basis of punitive damages calculations, but do not give this Court any basis for understanding the value of the compensatory damages. Second, Defendant relies on *TXO Prod'n Corp. v. Alliance Res. Corp.* for the proposition that the 5 to 1 ratio should be used to determine if the amount-in-controversy requirement is satisfied. 419 S.E.2d 870 (W.Va.1992), *aff'd* 509 U.S. 443 (1993). By its very language, *TXO* provides this ratio as an "outer limit" for punitive damages, not the standard. *Id.* at 889. Further, it is not clear to the Court that this case would merit an award of punitive damages, least of all damages in such a high ratio. **To the extent that there is doubt on this point, it is to be resolved in favor of remand.** See *Mulcahey,* 29 F.3d at 151.

Id. (emphasis added).

The Defendants herein have not made any settlement offers, much less an offer of an amount suggesting that it is "more likely than not" that the value of the case exceeds this Court's jurisdictional limit. Quite the contrary, the Encompass Defendants' reservation of rights letter (attached as Exhibit A to their Motion to Dismiss, Doc. 7-1) and their Motions to Dismiss, reveal that Defendants actually believe that the value falls well below the $75,000 threshold. Thus, "given the directive from the Fourth Circuit that when federal jurisdiction is doubtful remand is proper," *Knott v. HSBC Card Services, Inc*., 2010 WL 3522105 * 4 (N.D.W.Va. 2010), this case must be remanded to the Circuit Court of Jefferson County, West Virginia.

WHEREFORE, based upon the forgoing, the Plaintiffs respectfully request that this Court remand this case back to state court, and to award such other and further relief that the Court finds proper.

BANK OF CHARLES TOWN
By Counsel

/s/ Laura C. Davis

Laura C. Davis (WV No. 7801)
davis@skinnerfirm.com
Stephen G. Skinner (WV No.6725)
sskinner@skinnerfirm.com
SKINNER LAW FIRM
Counsel for Plaintiff
P.O. Box 487
Charles Town, WV 25414
(304) 725-7029
304-725-4082(fax)
www.skinnerfirm.com

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CERTIFICATE OF SERVICE

I, Laura C. Davis, counsel for the Plaintiff, do hereby certify that on the 17th day of November, 2010, I electronically filed the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Brent K. Kesner, Esquire
Tanya M. Kesner, Esquire
Ellen R. Archibald, Esquire
Kesner, Kesner & Bramble, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Counsel for Encompass Insurance Company, et. al.

E. Kay Fuller, Esquire
Martin & Seibert, LC
1453 Winchester Ave.
P.O. Box 1286
Martinsburg, WV 25402-1286
Counsel for Michele Grossman

/s/ Laura C. Davis
Laura C. Davis WVSB #7801